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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91226573
Party	Plaintiff Red Bull GmbH
Correspondence Address	Martin R. Greenstein TechMark a Law Corporation 4820 Harwood Road, 2nd Floor San Jose, CA 95124 UNITED STATES MRG@TechMark.com, NDG@TechMark.com, LZH@TechMark.com, AMR@TechMark.com, DMP@TechMark.com
Submission	Motion to Amend Pleading/Amended Pleading
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Date	02/29/2016
Attachments	VIS BUFFALO ENERGY DRINK-91226573-Amended Notice of Oppo.pdf(254626 bytes )

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that this correspondence is being filed electronically via ESTTA on the date set forth below.

Date: February 29, 2016

/Leah Z. Halpert/  
Leah Z. Halpert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

**RED BULL GMBH,**

**Opposer,**

**v.**

**OKONKO INTERNATIONAL COMPANY**

**Applicant.**

**Opposition No.: 91-226,573**

**Mark: VIS BUFFALO ENERGY DRINK**

**Application No.: 86/433,841**

**OPPOSER'S MOTION TO AMEND ITS**  
**NOTICE OF OPPOSITION AS A MATTER OF COURSE**

Pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), 37 C.F.R. § 2.107 and TBMP § 507, RED BULL GMBH ("Red Bull" or "Opposer") hereby amends its original Notice of Opposition to the First Amended Notice of Opposition, a copy of which is attached hereto.

Under Fed. R. Civ. P. 15(a)(1)(A), a party may amend its pleading once as a matter of course within 21 days after serving it. *See* TBMP § 507.01; 37 C.F.R. § 2.107(a). Here, Opposer filed its initial Notice of Opposition on February 26, 2016, and is filing this amended pleading within the 21 day period. This amended pleading is necessary as a review of the originally uploaded version clearly shows pages 2-7 have been inadvertently omitted from the electronic record. The original ESTTA cover sheet is correct and lists the correct grounds for opposition, however, the attached document only shows pages 1 and 8 of the pleading.

As this Motion to Amend is being filed within 21 days of filing of the original pleading, and

serves solely to correct the inadvertent omission of pages (all of which were duly served upon opposing counsel via first class mail on February 26, 2016), the First Amended Notice of Opposition (attached hereto) should be deemed the operative pleading in this opposition.

Respectfully submitted,

Dated: February 29, 2016

RED BULL GMBH  
By: /Martin R. Greenstein/  
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Attorneys for Opposer, Red Bull GmbH

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **OPPOSER'S MOTION TO AMEND ITS NOTICE OF OPPOSITION AS A MATTER OF COURSE** is being served on February 29, 2016, by deposit of same in the United States Mail, first class postage prepaid, in an envelope addressed to Applicant's Correspondent of Record at the address given on the TSDR website:

Matthew H. Swyers  
The Trademark Company  
344 Maple Ave West, PMB 151  
Vienna, VA 22180

/Leah Z. Halpert/  
Leah Z. Halpert

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that this Amended Notice of Opposition is being filed with the TTAB via ESTTA on the date set forth below, with the \$300 per class statutory filing fee previously paid.

Date: February 29, 2016

/Leah Z. Halpert/

Leah Z. Halpert

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**  
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

IN THE MATTER OF Application Serial No. 86/433,841 for the trademark VIS BUFFALO ENERGY DRINK (Class 32), filed October 24, 2014, and published in the Official Gazette of February 2, 2016.

**RED BULL GMBH,**

**Opposer,**

v.

**OKONKO INTERNATIONAL COMPANY**

**Applicant.**

**Opposition No.: 91-226,573**

**Mark: VIS BUFFALO ENERGY DRINK**

**Application No.: 86/433,841**

**NOTICE OF OPPOSITION**

RED BULL GMBH, a limited liability company organized and existing under the laws of Austria, with its principal place of business at Am Brunnen 1, 5330 Fuschl am See, AUSTRIA, (hereafter “Red Bull” or “Opposer”) believes it is or will be damaged by registration on the Principal Register of the mark VIS BUFFALO ENERGY DRINK shown in Appln. Ser. No. 86/433,841 (hereinafter the “**VIS BUFFALO Mark**”), and hereby opposes the same.

As grounds of opposition it is alleged that:

1. Opposer is now and has for many years been engaged in the development, marketing, advertising, distribution and sale of various products and services including, among others, beverages, energy drinks, sports drinks, soft drinks, and various other products and services related or complementary thereto.

2. Opposer is the owner of the corporate name, trade name and trademark RED BULL,

having used said name and mark continuously in interstate commerce on and in connection with its beverages, energy drinks, sports drinks, soft drinks, and various other products and services related or complementary thereto since long prior to the January 29, 2014 claimed first use in commerce date and the October 24, 2014 filing date of Applicant's VIS BUFFALO Mark, opposed herein.

3. Opposer is the owner of various Federal registrations and common law rights for trademarks RED BULL, RED BULL & Two Bulls Logo, Two Bulls Logo, (Single) Bull Logo, BULL, and other marks for or incorporating the word BULL, and/or the design of a bull or bovine animal for various goods and services, all of which are collectively referred to herein as Opposer's **"RED BULL and Bull Logo Marks"**. Opposer's RED BULL and Bull Logo Marks have been used in U.S. commerce on and in connection with beverages, energy drinks, sports drinks, soft drinks, and various other products and services related or complementary thereto since long prior to the January 29, 2014 claimed first use in commerce date and the October 24, 2014 filing date of Applicant's VIS BUFFALO Mark, opposed herein.

4. Opposer's RED BULL and Bull Logo Marks are arbitrary marks, and have achieved a high degree of notoriety, fame and reputation as identifiers of Opposer's beverages, energy drinks, sports drinks, soft drinks, and various other products and services.

5. Opposer's various RED BULL and Bull Logo Marks are and have become valuable assets of Opposer, identifying its beverages, energy drinks, sports drinks, soft drinks, and various other products and services related or complementary thereto, and distinguishing Opposer's products and services from the products and services of others.

6. Opposer's various RED BULL and Bull Logo Marks as described herein have been extensively advertised in the United States and throughout the world, and have appeared on or in relation to products, product packaging, point-of-sale displays and other promotional materials for products sold, offered and advertised, and/or have been used in connection with various services,

sporting events, contests, exhibitions and cultural events advertised, offered, conducted and/or promoted in the United States and throughout the world.

7. In 2014 alone, sales of RED BULL beverages exceeded 5.6 billion units worldwide, with over 2.1 billion units sold in the United States. As a result of the enormous success and sales of Opposer's beverages and of the extensive advertising and promotion of the RED BULL and Bull Logo Marks on said beverages and various other products and services in the United States and throughout the world, the RED BULL and Bull Logo Marks have become and are famous marks, and are recognized in the United States and elsewhere as such.

8. The depictions of a bull, as used and registered by Opposer typically show a bull in a charging, aggressive, and/or fighting pose, posture, and expression.

9. Applicant, Okonko International Company ("Applicant"), a sole proprietorship consisting of Basil Nwachukwu organized under the laws of the State of California, whose address is given as 9586 North Sharon Avenue, Fresno, CA 93720, filed Appln. No. 86/433,841 on October 24, 2014, claiming bona fide use in commerce of the VIS BUFFALO Mark on the International Class 32 goods set forth therein, namely "*Energy drinks*". Applicant's declaration of use was signed by Matthew H. Swyers, Applicant's attorney of record. The VIS BUFFALO Mark was published for opposition on February 2, 2016.

10. Applicant's VIS BUFFALO Mark specifically disclaims the terms "ENERGY DRINK", leaving VIS BUFFALO as the only portion of the mark with trademark significance.

11. Based on information and belief as the result of due investigation of the public records, Applicant's claimed use of the VIS BUFFALO Mark is on a can featuring the color red and a depiction of a charging bovine animal seen from the side (shown below):



12. Based on information and belief as the result of due investigation of public records, Applicant has advertised the VIS BUFFALO mark and related energy drink product under the mark RED BUFFALO, as shown in the below depiction:



13. Applicant's VIS BUFFALO Mark (and prior or current alternate RED BUFFALO mark), combining the term BUFFALO with a charging bovine animal and the prominent use color red for use on energy drinks is a direct reference to Opposer, and is intended to play off of Opposer's well-known and famous RED BULL and Bull Logo Marks.

Claim 1: Likelihood of Confusion under Trademark Act § 2(d)

14. Opposer repeats and realleges each and every allegation contained in paragraphs 1-13, inclusive, as if fully recited in this paragraph.

15. Applicant's VIS BUFFALO Mark is a close approximation of the famous RED BULL and Bull Logo Marks owned by Opposer.

16. The goods on which Applicant asserts bona fide intent to use its VIS BUFFALO Mark in commerce are identical to, used for the same or similar purposes, and/or are or will be advertised and promoted to and directed at the same trade channels, the same purchasers, and are or will be used in the same environment as Opposer's products and services described herein, sold and/or offered under Opposer's RED BULL and Bull Logo Marks.

17. Simultaneous use of Applicant's VIS BUFFALO Mark on the goods set forth in Appln. No. 86/433,841, and Opposer's RED BULL and Bull Logo Marks on its goods and services as set forth above is likely to cause confusion, mistake or deception among purchasers, users and the public, thereby damaging Opposer.

18. Use by Applicant of its VIS BUFFALO Mark on the goods set forth in Appln. No. 86/433,841, is likely to lead to the mistaken belief that Applicant's products are sponsored by, affiliated with, approved by or otherwise emanate from Opposer, thereby damaging Opposer.

19. Based on ¶¶ 14-18 above, Applicant's VIS BUFFALO Mark is likely to cause confusion with Opposer and its RED BULL and Bull Logo Marks, in violation of Lanham Act § 2(d), and is, therefore, not entitled to registration.

Claim 2: Non-Use and False Declaration

20. Opposer repeats and realleges each and every allegation contained in paragraphs 1-19, inclusive, as if fully recited in this paragraph.

21. On information and belief based on the results of a due investigation of the public



records, on October 24, 2014, Matthew H. Swyers, in his stated capacity of Attorney of Record, filed a signed declaration that the VIS BUFFALO Mark was in use in U.S. commerce on or in connection with the goods identified in Appln. No. 86/433,841, as evidenced by the specimen.

22. On information and belief based on the results of a due investigation of the public records, on February 13, 2015, the USPTO issued an office action, refusing Appln. No. 86/433,841 partially on the ground that the specimen appeared to be digitally created or altered to be submitted with the application, and thus did not show the applied-for mark in use in commerce on the goods identified in Appln. No. 86/433,841.

23. On information and belief based on the results of a due investigation of the public records, on June 17, 2015, Applicant's attorney of record filed a response to the office action, stating that "Applicant will submit a substitute specimen in the near future".

24. On information and belief based on the results of a due investigation of the public records, the specimen refusal was made final on August 22, 2015.

25. On information and belief, based on the results of a due investigation of the public records, on December 3, 2015, Matthew H. Swyers, in his stated capacity of Attorney of Record, submitted a substitute specimen and signed declaration attesting that "the substitute specimen was in use in commerce at least as early as the filing date of the application".

26. The substitute specimen consisted of a "screenshot of Applicant's website" featuring, the same digital image of the product submitted as the originally rejected specimen. The website (an electronic display) does not provide any means for ordering the identified goods.

27. On information and belief based on the results of a due investigation, Applicant knowingly did not have use of the VIS BUFFALO Mark in U.S. commerce on or in connection with the goods of Appln. No. 86/433,841 as of the October 24, 2014 filing date.

28. On information and belief based on the results of a due investigation, Applicant

knowingly did not have use of the VIS BUFFALO Mark on or in connection with the goods of Appln. No. 86/433,841 within the meaning of “use in commerce” in the Trademark Act, 15 U.S.C. §§ 1051 and 1127, as of the October 24, 2014 date the original declaration of use was knowingly caused to be signed and filed, or the December 3, 2015 date the declaration for the substitute specimen was knowingly caused to be signed and filed.

29. Based on the above, Applicant knowingly caused false declarations to be signed and filed on both October 24, 2014 and December 3, 2015, and Appln. No. 86/433,841 should be refused on the grounds of non-use and false declaration.

Claim 3: Dilution by Blurring and Tarnishment under Trademark Act § 43(c)

30. Opposer repeats and realleges each and every allegation contained in paragraphs 1-29, inclusive, as if fully recited in this paragraph.

31. As set forth above, Applicant’s VIS BUFFALO Mark is substantially similar to and intended to reference Opposer’s famous RED BULL and Bull Logo Marks.

32. As set forth above, due to extensive marketing, advertising, and sales in the United States, Opposer’s RED BULL and Bull Logo Marks are famous throughout the entire United States, and became famous long prior to the October 24, 2014 filing date and January 29, 2014 claimed first use date of Applicant’s VIS BUFFALO Mark.

33. Opposer’s RED BULL and Bull Logo Marks are so distinctive in the United States that the public would associate them with Opposer even devoid of a trademark context or apart from the extensive goods and services offered by Opposer under them.

34. The use of Applicant’s VIS BUFFALO Mark is likely to cause dilution by blurring as consumers, upon seeing Applicant’s use of its VIS BUFFALO Mark on the goods of Appln. No. 86/433,841, would be immediately reminded of Opposer’s famous RED BULL and Bull Logo Marks, and associate Applicant’s use with Opposer.

35. The use of Applicant's VIS BUFFALO Mark is likely to cause dilution by tarnishment as the association arising from the substantially similar nature of Applicant's VIS BUFFALO Mark and Opposer's famous RED BULL and Bull Logo Marks will harm the reputation of Opposer's famous RED BULL and Bull Logo Marks.

36. Therefore, based on ¶¶ 30-35 above, Applicant's VIS BUFFALO Mark is likely to cause dilution by blurring and dilution by tarnishment of Opposer's famous RED BULL and Bull Logo Marks in violation of Lanham Act § 43(c), and is not entitled to registration.

Wherefore, Opposer requests that registration of the mark sought to be registered herein, VIS BUFFALO ENERGY DRINK of Appln. No. 86/433,841, be denied and that this opposition be sustained.

RED BULL GMBH  
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Dated: February 29, 2016

### **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **AMENDED NOTICE OF OPPOSITION** is being served on February 29, 2016, by deposit of same in the United States Mail, first class postage prepaid, in an envelope addressed to Applicant's Correspondent of Record at the address given on the TSDR website:

Matthew H. Swyers  
The Trademark Company  
344 Maple Ave West, PMB 151  
Vienna, VA 22180

/Leah Z. Halpert/  
Leah Z. Halpert